LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
MAR 4 1972
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1129

MRS. DAISY MILLER BOYD BEL and RICHARD E. GERARD, Co-executors under the Last Will and Testament of John Albert Bel, et al,

Petitioners,

versus

UNITED STATES OF AMERICA,

Defendant.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Austin W. Lewis
225 Baronne Street, 22nd Floor
New Orleans, Louisiana 70112
Attorney for Petitioners

INDEX

	Page
Opinions Below	1
Jurisdiction	1
Question Presented	2
Statutes and Regulations Involved	2
Statement	4
Reasons For Granting the Writ	6
Conclusion	10
Appendix A — District Court Opinion	1a
Appendix B — Court of Appeals Opinion	20a
Appendix C — District Court Judgment	46a

AUTHORITIES

Cases:

Chapin, Estate of, 39 T.C.M. 11 (1970)	7
Coleman, Estate of, 52 T.C. 931 (1969)	8
First National Bank of Midland v. United States, 423 F.2d 1286 (1970)	6, 7, 8, 9, 10
Gorman v. United States, 288 F. Supp. 225 (E.D. Mich. 1968)	7, 10

Statutes:

26 USC Sec. 2035	2, 6
28 USC 1254	1

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1971

No. _____

MRS. DAISY MILLER BOYD BEL and RICHARD E. GERARD, Co-executors under the Last Will and Testament of John Albert Bel, et al,

Petitioners,

versus

UNITED STATES OF AMERICA,

Defendant.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Petitioners respectfully pray that a Writ of Certiorari issue herein to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding December 9, 1971.

OPINIONS BELOW

The opinion of the District Court (App. A, p. 1a-19a) is reported in 310 F.Supp. 1189. The opinion of the Fifth Circuit Court of Appeals (App. B, p. 20a-45a) is reported at 72-1 USTC ¶ 12,818.

JURISDICTION

The judgment of the Fifth Circuit Court of Appeals was entered on December 9, 1971. The jurisdiction of this Court is invoked under 28 USC 1254(1).

QUESTION PRESENTED

Commencing in October of 1957, the decedent, John Albert Bel, purchased annually an accidental death policy on his own life in the principal amount of $250,000.00. Each policy covered a term of one year. The last such policy was acquired in October, 1960, less than one year prior to the decedent's accidental death October 2, 1961. The decedent executed the application for each policy and paid the premiums, but each policy from its inception was owned by the decedent's three children with all of the incidents of ownership. The question presented here is whether the acquisition of an accidental death policy in which the decedent never possessed any incidents of ownership constituted a "transfer" of the accidental death policy within the meaning of Section 2035 of the Internal Revenue Code of 1954 (26 USC Section 2035).

STATUTE INVOLVED

Internal Revenue Code of 1954 (26 USC):

> SEC. 2035. TRANSACTIONS IN CONTEMPLATION OF DEATH.
>
> (a) General Rule.— The value of the gross estate shall include the value of all property (except real property situated outside of the United States) to the extent of any interest therein which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in

money or money's worth) by trust or otherwise, in contemplation of his death.

(b) Application of General Rule — If the decedent within a period of 3 years ending with the date of his death (except in case of a bona fide sale for an adequate and full consideration in money or money's worth) transferred an interest in property, relinquished a power, or exercised or released a general power of appointment, such transfer, relinquishment, exercise, or release shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this section and sections 2038 and 2041 (relating to revocable transfers and powers of appointment); but no such transfer, relinquishment, exercise, or release made before such 3-year period shall be treated as having been made in contemplation of death.

SEC. 2042. PROCEEDS OF LIFE INSURANCE.

(1) Receivable by the executor. — To the extent of the amount receivable by the executor as insurance under policies on the life of the decedent.

(2) Receivable by other beneficiaries. — To the extent of the amount receivable by all other beneficiaries as insurance under policies on the life of the decedent with respect to which

the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any other person.

* * *

STATEMENT OF THE CASE

Commencing in October, 1957, and continuing annually thereafter, there was issued an accidental death policy on the life of the decedent in the amount of $250,000.00. Each policy contained the following declaration:

> "In consideration of the premium charged it is hereby understood and agreed that Ernest Fred Bel, James Boyd Bel, Jeanne Bel, heirs of the insured, is the owner of this policy, and the insured may not receive any benefits, exercise any right or enjoy any privilege provided under this policy. Notwithstanding anything in this policy to the contrary, the owner alone may receive every benefit, exercise every right and enjoy every privilege which, in the absence of this 'ownership of policy' provision would have been available to the insured under this policy."

A new policy was issued annually and each was for a term of one year. The last accidental death policy was purchased in October, 1960, and was in effect when decedent died by accidental means October 2, 1961. The decedent signed an application for each policy and

the premium on each policy was paid by the decedent out of community funds.

The full accidental death proceeds were paid to the decedent's three children by the insurer. Decedent's executors filed an estate tax return in which they did not include in the decedent's gross estate the proceeds of the accidental death policy. Upon examination of the return, the Commissioner of Internal Revenue included in the gross estate of the decedent $125,000.00 representing 1/2 of the proceed value of the accidental death policy and assessed a deficiency which resulted in part from a determination that the accidental death policy had been "transferred" by the decedent to his children in contemplation of death. The executors paid the deficiency, filed a claim for refund, and then instituted this suit under 28 U.S.C. Section 1346(a)(1).

With respect to the issue involved here, the District Court found that there was no "transfer" of the policy within the meaning of Section 2035 and held that the amount includable in the decedent's gross estate was the purchase price of the policy, that is the premiums paid, rather than its proceed value resulting from the decedent's accidental death.

On appeal the Fifth Circuit Court of Appeals reversed the District Court and held that the full amount of the decedent's community share of the policy proceeds was includable in the decedent's gross estate.

REASONS FOR GRANTING THE WRIT

1. The question involved here is important. The Court of Appeals noted in the preamble to its decision that it deemed the issue involved here "to be of transcendent importance." Of the various issues before the Court of Appeals in this cause the Court referred to this issue as "the Goliath."

2. Beyond its immediate effect on the taxpayers involved here, the decision of the Fifth Circuit Court of Appeals is disturbing as a precedent. Most accidental death policies are issued for a term of one year, so that the decision of the Court of Appeals effectively precludes the acquisition of an accidental death policy and excluding the proceed value thereof from the gross estate of the decedent. This is in clear contravention of Section 2052 of the Internal Revenue Code (26 USC Sec. 2042).

3. The decision below conflicts with a prior decision of the Fifth Circuit Court of Appeals in *First National Bank of Midland v. United States*, 423 F.2d 1286 (1970).

4. The District Court correctly held that the only property transferred by the decedent was the premiums paid by the decedent on the policy owned by his children. The District Court held that since the policy was from its inception owned by the decedent's children, there was no "transfer" of the policy within the meaning of Section 2035 of the Internal Revenue Code of 1954 (26 USC Sec. 2035) and the Court refused to

include one-half of the proceed value of the policy in decedent's estate stating:

> "Decedent held no interest whatsoever in the policy or its proceeds. His children were the sole owners of the policy and only they could deal with rights and benefits flowing therefrom. To be sure, these payments kept the economic substance of that ownership alive. But the decisive point is that when these payments created or maintained was theirs and not his. Under these circumstances, we can see no basis for concluding that there was a constructive transfer of an interest in the policy. The only thing diverted from his estate was the actual money paid."

This holding of the District Court is not only correct but is supported by all of the decisions rendered on this point since the Government's publication of its widely criticized Revenue Ruling 67-463, 1967 — 2 C.B. 327, referred to on pages 28a-29a of the decision of the Court of Appeals.

The decisions uniformly supporting Taxpayer on this point are: *First National Bank of Midland, Texas v. United States*, 423 F.2d 1286 (5th Cir. 1970); *Gorman v. United States*, 288 F. Supp. 225 (E. D. Mich. 1968), *Estate of Coleman*, 52 T.C. 921 (1969); *Estate of Chapin*, 39 T.C.M. 11 (1970). The only exception to this clear weight of authority is the District Court's opinion in *First National Bank of Midland v. United States*, 69-1 U.S.T.C. paragraph 12, 574 (W.D. Tex. 1968), which

was reversed by the Fifth Circuit on appeal. *First National Bank of Midland v. United States*, supra.

The position taken by Internal Revenue Service and approved by the court below has met with almost total rejection by the courts. The Tax Court in *Estate of Coleman*, 52 T.C. 921 at 922 stated:

> "... it is clear from the legislative history that Congress sought to inter the 'premium payment' with the ashes of the 1939 Code as an independent generating force for the includability of insurance proceeds. Under these circumstances we hesitate to adopt an expensive construction of Section 2035 in the area of life insurance, which would permit that test to rise phoenixlike from the language of that section.
>
> "Section 2035, by its terms, applies only to a 'transfer' of an interest in property by a decedent. In Rev. Rul. 67-463, 1967-2 C.B. 327, respondent decreed that the mere payment of premiums operated as a transfer of an interest in the proceeds of insurance — in this case by the decedent to her children. We disagree."

This reasoning was approved by the court below in *First National Bank of Midland v. United States*, 423 F.2d 1286 (1970) in the following clear statement:

> "... It is said that the daughter received insurance benefits and not cash and that the payment of each and every premium helped to

> produce the proceeds. The answer to this, however, may be found in Gorman, supra, as well as the decision of the Tax Court in the Estate of Inez Coleman, 52 T.C. 921 (1969). We agree with the Tax Court that the rights maintained belonged to the owners, not to the decedent, and were thus neither transferred nor transferrable by the decedent."

The facts in the instant case are indistinguishable from those before the courts in *First National Bank of Midland, Gorman,* and *Coleman* and should be decided based on this solid line of authority.

The decision here attempts to distinguish these cases by contending that the decedent made a "transfer" of the policy in contemplation of death when in fact no transfer was made. The decedent executed the application and paid the premium for each of the annual accidental death policies issued. However, the policy *when issued* provided clearly that all the incidents of ownership were held by the decedent's children. The children had the right to collect the proceeds of the policy from the moment of its inception and the decedent never had any interest therein. The Fifth Circuit set forth clearly in *First National Bank of Midland v. United States,* supra at p. 1288, the test for finding a transfer of the policy:

> "We cannot agree that any bundle or rights was transferred as already pointed out, *the right to collect the proceeds of the policies have existed from the inception of the policies.*" (Emphasis added)

This is exactly the case here. When each accidental death policy was issued it stated very clearly that the policy and all incidents of ownership vested in the three Bel children. Here, as in *First National Bank of Midland*, the right to collect the proceeds and all other incidents of ownership under the policy existed in the children from the inception of the policy. The rights were evidenced by a contract issued by the insurer to the decedent's children. However, the court below refused to follow its earlier decision.

The Government seeks to eke out a fictitious "transfer" of the policy from the decedent's execution of the application for insurance and his subsequent payment of the premiums. Neither of these facts nor both of them together are sufficient to vest in the decedent the ownership of the policy which is a necessary precedent to finding its transfer. In *Gorman v. United States*, supra, the decedent executed an application for two policies within a year prior to his death. The court, assuming that the decedent had paid the subsequent premium, limited to the amount of the policy to be included to the premium paid.

For reasons stated, this petition for certiorari should be granted.

Respectfully submitted,

Austin W. Lewis

March 3, 1972.

CERTIFICATE

I HEREBY CERTIFY that service of the foregoing application for writ of certiorari has been made this 3rd day of March, 1972, on counsel for the Defendant by depositing three copies thereof, postage prepaid, in the United States Mail, to each of the following:

Johnnie M. Walters, Esq.
Assistant Attorney General
United States Department of Justice
Tax Division
Washington, D. C. 20530
Attention: M. L. Paup

Charles G. Barnett, Esq.
Attorney, Tax Division
Department of Justice
8E2 Federal Office Building
Dallas, Texas 75202

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, LAKE CHARLES DIVISION

CIVIL ACTION No. 13,474

MRS. DAISY MILLER BOYD BEL and RICHARD E. GERARD, CO-EXECUTORS OF LAST WILL OF JOHN ALBERT BEL, DECEASED; and MRS. DAISY MILLER BOYD BEL; ERNEST F. BEL; JAMES B. BEL; and JEANNE BELL INGRAHAM

versus

THE UNITED STATES OF AMERICA

HUNTER, JUDGE:

This case involves five separate items. There is no dispute as to any material fact in this suit. A Stipulation of Fact is attached and made a part hereof by reference.

John Bel died by accidental means October 2, 1961, at his domicile in Lake Charles, Louisiana. He left a last will bequeathing to his widow, Daisy Miller Boyd, one-half of the decedent's separate property and bequeathing the remainder of his property in trust for the three children, one of whom, Jeanne Bel, was a minor at the time of Mr. Bel's death.

Plaintiffs Daisy Boyd Bel and Richard E. Gerard, Executors under decedent's will, filed the Federal Estate Tax Return and, after audit, were notified of a deficiency, which plaintiffs paid through two checks dated October 26, 1965 and December 7, 1965. Subsequently, the Executors filed with the District Director a Claim for Refund in the sum of $214,539.24. On October 20, 1966 the claim was disallowed by the District Director in its entirety. The Executors filed a protest against the determination made by the District Director and requested that the matter be referred to the Appellate Division of the Regional Commissioner's Office. Conference was held and the appellate conferee denied plaintiffs' claim in its entirety. This suit followed.

The deficiency claimed by the District Director, for which refund is sought, results from:

(1) Inclusion in the gross estate of the value of certain mineral right interests, shares of stock, and cash in bank owned by decedent's daughter, Jeanne Bel, who was a minor at the time of decedent's death. The value of these assets totals $30,933.61.

(2) Inclusion in the gross estate of $113,685.71, representing one-half of the proceed value of nine life insurance policies on the life of the decedent naming his wife, Daisy Boyd Bel, as owner.

(3) Inclusion in the gross estate of $125,000.00, representing one-half of the proceed value of an accidental death policy issued on decedent's life October 22, 1960,

by Lloyds Group, Mid-Continent Underwriters, and owned by the decedent's three children.

(4) Reduction of the marital deduction from $1,088,990.32, representing the value of the property interest which passed from the decedent to Daisy Boyd Bel, his surviving spouse, to the extent of 50% of the value of decedent's separate property as claimed by plaintiffs under Internal Revenue Code Section 2056, to $917,639.38 as calculated by the District Director by reducing the marital deduction to the net disposable portion available under the law of Louisiana to a decedent who at the time of his death left three children surviving him.

(5) Refusal of the District Director to allow deduction of $25,000.00 representing additional fees and expenses incurred and to be incurred by the plaintiffs and claimed as additional administrative expenses under the provisions of Section 2053 of the Internal Revenue Code of 1954.

Two of the issues have pretty well been resolved and they will be disposed of first.

SHOULD THERE BE INCLUDED IN THE GROSS ESTATE OF THE DECEDENT THE PROCEED VALUE OF THE NINE LIFE INSURANCE POLICIES ON THE LIFE OF THE DECEDENT PURCHASED DURING THE MARITAL COMMUNITY, PAID FOR OUT OF COMMUNITY FUNDS, BUT WHICH NAMES THE DECEDENT'S WIDOW AS OWNER

WITH ALL THE INCIDENTS OF OWNERSHIP?

This decision has been decided in favor of plaintiffs and against the defendant by the Fifth Circuit in *Catalano v United States*, Fifth Circuit; December 16, 1969. The Government concedes that this Court must follow that decision and hold adversely to the United States on this issue. The defendant, however, has reserved the right to perfect an appeal on this issue in the event the United States seeks a writ of certiorari in *Catalano*. The insurance policies involved must be held to be the separate property of Mrs. Bel, because she alone had the incidents of ownership, and the proceeds thereof should not be included in Mr. Bel's community estate for tax purposes.

IS THE ESTATE ENTITLED TO A DEDUCTION FOR ADDITIONAL ATTORNEYS' FEES IN THE AMOUNT OF $25,000?

During the examination of the return the Internal Revenue Service disallowed a deduction for attorneys' fees in the amount of $25,000 on the basis that the payment of the fees had not been substantiated. The defendant concedes that the amount is reasonable in view of the size and complexity of the estate, and that a deduction should be allowed upon proper proof of payment before final judgment is entered.

There remain the three issues still in dispute:

1. SHOULD THE VALUE OF THE PROPER OWNED BY THE DECEDENT'S MINOR DAUGHTER, JEANNE BEL, BE INCLUDED IN THE DECEDENT'S ESTATE?

The defendant argues that the value of the shares of stock and the mineral rights donated by the decedent to his minor daughter, Jeanne, as well as the cash in Jeanne's checking and savings account should be included in the gross estate of the decedent because of the provisions of Section 2036(a) and 2038(a)(1) of the Internal Revenue Code.

Defendant's argument is based on the erroneous interpretations of Articles 221, 223, and 226 of the Louisiana Civil Code.

Article 221 states in part:

"The father is, during the marriage, administrator of the estate of his minor children and the mother in case of his interdiction or absence during said interdiction or absence. He or she shall be accountable both *for the property and revenues of the estates, the use of which he or she is not entitled to by law and for the property only of the estate the usufruct of which the law gives him or her.*" (emphasis added)

Article 223 of the Code provides:

> "Fathers and mothers shall have, during marriage, the enjoyment of the estate of their children until their majority or emancipation."

Article 224 of the Code provides:

> "The obligations resulting from this enjoyment shall be: (1) the same obligations to which usufructuaries are subjected; (2) to support, to maintain and to educate their children according to their situation in life."

Articles 223 and 224 are qualified by Article 226 of the Code which says:

> "This usufruct shall not extend to any estate, which the children may acquire by their own labor and industry, nor to such estate as is given or left them under the express condition that the father and mother shall not enjoy such usufruct. *Neither shall such usufruct extend to such estate as is given the children by donation inter vivos by either the father or the mother unless such estate shall have been donated by written act executed by the father* or *mother and the right to such usufruct has been reserved therein.*" (emphasis added)

These articles give parents the right of enjoyment of the estates of children who are subject to their pater-

nal authority. However, parents are precluded from the enjoyment of property donated to a child by one of the parents, unless the right of enjoyment is expressly reserved in the written act of donation. Civil Code Article 226, supra. Mr. Bel did not reserve the usufruct when he donated the mineral interests and the stock of his minor daughter, and therefore was precluded from the enjoyment of the property given to his child.

We find no merit to the Government's argument that since Section 20.2036-1 (b)(2) of the Treasury Regulations on Estate Tax provides that the phrase "use, possession, right to the income, or other enjoyment of the transferred property" embraces the right to apply income to the discharge of a legal obligation of the decedent, including a legal obligation to support a dependent during the decedent's lifetime, and since Mr. Bel allegedly, under Louisiana law, was under "a legal obligation to support his minor daughter and could have used the income from the property he transferred to his daughter to discharge his legal obligation to provide maintenance and support to his daughter, Article 2036(A) of the Internal Revenue Code and the regulations promulgated pursuant thereto require the inclusion of said assets in the decedent's gross estate."

Defendant cites several decisions to the effect that the value of trust property should be included in a grantor's gross estate where he retained the right to have the income used to discharge his legal obligation, and hence, reserved the possession or enjoyment of or the right to the income from this property. These

cases are not pertinent. Here Mr. Bel made outright gifts of the mineral interests and stock to Jeanne. He did not stipulate the purpose for which the stock or mineral interests were to be used. The gifts were donations inter vivos with no strings attached and the decedent had no right to use the mineral interests and stocks or their revenues to discharge any legal obligation which he might have owed to his daughter. He attached no strings to the gifts. The gifts were irrevocable and unconditional. The only authority Mr. Bel had with respect to these interests under the law of Louisiana resulted from his being administrator of his children's estate during the marriage. This authority did not give Mr. Bel the right to use the money for Jeanne's support and education. Considering his financial condition, if Mr. Bel had applied to the court for authority to sell his daughter's property to pay for her support, the court would have dismissed his application out of hand.

In substance, defendant would have the court hold that the law of Louisiana is such that a parent cannot make an inter vivos donation to his minor child and escape the estate tax liability imposed by Sections 2036 and 2038 of the Internal Revenue Code if the parent dies before the child reaches majority. This is simply not the case with respect to an unconditional, irrevocable gift as is shown by the applicable Articles of the Louisiana Civil Code.

2. THE PROCEEDS OF AN ACCIDENTAL DEATH INSURANCE POLICY ON THE LIFE OF THE DECEDENT, TITLE TO WHICH

WAS PLACED IN HIS CHILDREN'S NAME, SHOULD BE INCLUDED IN HIS GROSS ESTATE AS A GIFT IN CONTEMPLATION OF DEATH UNDER THE PROVISIONS OF SECTION 2035 OF THE INTERNAL REVENUE CODE OF 1954

Commencing in October, 1957, the decedent purchased for his children an accidental death policy of $250,000.00. Under the company's rules, a new policy was issued each year. Each policy contained the following provision:

> "In consideration of the premium charged it is hereby understood and agreed that Earnest Fred Bel, James Boyd Bel, Jeanne Bel, heirs of the insured, is the owner of this policy, and the insured may not receive any benefits, exercise any right or enjoy any privilege provided under this policy. Notwithstanding anything in this policy to the contrary, the owner alone may receive every benefit, exercise every right and enjoy every privilege which, in the absence of this 'ownership of policy' provision would have been available to the insured under this policy."

The last accidental death policy, purchased by the decedent October 22, 1960, was in effect at the time of his death. The full accidental death proceeds were paid to the beneficiaries by the insurer.

Intrinsically involved are two very different and distinct questions of law: (1) Was the accidental death policy taken out "in contemplation of death," as defined by Section 2035 of the Internal Revenue Code, and (2) If the policy does fall within this classification, what amount, in terms of dollars and cents, is to be included in the decedent's estate?"

(1). *Was the accidental death policy taken out "in contemplation of his death?"*

Section 2035 includes transfers in lieu of testimentary dispositions if made prior to death in an attempt to avoid estate tax or for any other death-connected reason. *United States v. Wells*, 283 U.S. 102 (1931). Any transfer, if in contemplation of death, is within Section 2035. A special rule is applicable, however, if the transfer was within three years prior to the date of the decedent's death. In that circumstance, the transfer is rebuttably presumed to have been made in contemplation of death. The party opposing the payment of the estate tax must show, by a preponderance of the evidence, that the transfer was not made in contemplation of death. It is immaterial that the decedent absolutely transferred his entire title to interest in or possession of the property. *Landorf v. United States*, 408 F.2d 461 (1969).

The vagaries of each case must be closely examined, including the decedent's physical and mental condition "and all other attendant facts and circumstances" (Treas. Reg. § 20.2035-1) to determine whether a specific transfer was prompted by some death-oriented

reason or by a life-motive. The phrase "contemplation of death," of course, does not mean the general expectation of death that all persons entertain. Its meaning, however, is not restricted to an apprehension that death is imminent. Treas. Reg. § 20.2035-1(c). Generally, both life and death motives are involved in these transfers, and the inquiry, therefore, becomes whether the "life" motives were the "dominant controlling or impelling" reasons for the transfer. *Allen v. Trust Co. of Georgia*, 326 U.S. 630, 66 S. Ct. 389, 90 L. Ed. 367 (1946).

The transfer was within the three year period; it was presumptively "in contemplation of death." The burden of going forward with the evidence to establish dominant life-motives is on plaintiffs. Admittedly, when the property transferred is life insurance, there is a death-connected motivation because life insurance proceeds (and an accidental death policy more particularly because it has neither cash surrender nor loan value) are payable only when the insured dies. Therefore, it naturally may be more difficult for plaintiffs to show dominant life-motives.

Motivation is primarily a question of subjective intent. In this case, it is aptly stated by the plaintiff on page 28 of his original brief:

> "Certainly it cannot be said that Mr. Bel, the decedent here, relatively young (48), in good health, active in business and sports, making a gift that had a legitimate business purpose of assisting his heirs in preserving his estate, could not possibly be considered as having

made a gift of this policy in the fear that death was near at hand."

But, imminent death is not the only criterion by which a gift is deemed given "in contemplation of death," and due to the particular facts involved in this case, we cannot hold that plaintiff has shown by a preponderance of evidence that the gift was life-motivated, and therefore not "in contemplation of death."

SINCE THE POLICY DOES FALL WITHIN SECTION 2035, WHAT AMOUNT IS INCLUDED IN THE ESTATE?

It is clear from the legislative history that Congress sought to inter the "premium payment" test with the ashes of the 1939 Code as an independent generating force for the includability of insurance proceeds. Under these circumstances, we shall not adopt an expansive construction of section 2035 in the area of life insurance, which would permit that test to rise phoenix-like from the language of that section. *Est. of Inez G. Coleman*, 5299 P-H TC (1969).

Section 2035, by its terms, applies only to a "transfer" of an interest in property by a decedent. If the decedent had purchased a life insurance policy, initially retaining the ownership in herself, and thereafter assigned it to her children, there clearly would have been a "transfer" of an interest in the policy. If, on the other hand, decedent had given money to his children, and they, entirely on their own volition, had chosen to purchase an insurance policy on his life it would

equally be clear that only the money would have been "transferred."

The purpose of Section 2035 is to prevent the avoidance of estate tax through the use of gifts as a substitute for testimentary disposition of what would otherwise be included in the gross estate. *Milliken v. U.S.*, 283 U.S. 15 (1931). The focus, therefore, must be on what the decedent parted with as a result of his payment of premiums in contemplation of death. Decedent held no interest whatsoever in the policy or its proceeds. His children were the sole owners of the policy and only they could deal with rights and benefits flowing therefrom. To be sure these payments kept the economic substance of that ownership alive. But the decisive point is that what these payments created or maintained was theirs and not his. Under these circumstances, we can see no basis for concluding that there was a constructive transfer of an interest in the policy. The only thing diverted from his estate was the actual money paid. *Est. of Inez Coleman*, supra.

Only the dollar amount of the premiums paid in contemplation of death is includable in the gross estate of the decedent herein, which amounts to $160.00 per year (decedent's 1/2 community) for three years or $480.00.

THE MARITAL DEDUCTION OTHERWISE AVAILABLE TO THE DECEDENT'S ESTATE SHOULD BE LIMITED TO HIS "DISPOSABLE PORTION" AS DEFINED BY LOUISIANA LAW.

In his will, the decedent bequeathed to his surviving spouse one-half of all of the separate property that he owned at his death and confirmed to his spouse the usufruct which the laws of Louisiana allowed her on the decedent's one-half share of their community property. Under 5 West's Louisiana Statutes Annotated, Civil Code, Article 1493, however, a decedent who leaves three or more children surviving him cannot dispose of more than one-third of his estate to persons other than his children. Article 1495 of the Louisiana Civil Code states that in such cases the children are "forced heirs," because the donor cannot deprive them of the portion of his estate reserved for them by law, except in cases where he has just cause to disinherit them. On January 31, 1962, the decedent's surviving spouse and his three surviving children executed a Notarial Act under which the surviving children waived and renounced their right to contest or oppose the bequest that the decedent made to his surviving spouse, and the surviving spouse renounced her usufruct as to the cash owned by or accruing to the decedent's share of their community estate and acknowledged that her usufruct as to certain mineral royalty interests formerly owned by the community did not entitle her to the proceeds on production accruing to the decedent's one-half community share of such royalty interests.

Section 2056 of the Internal Revenue Code of 1954, Appendix A, *infra*, allows the estate of a decedent a deduction from the gross estate measured by the value of the property which passes to the decedent's surviving spouse limited to one-half of the decedent's "ad-

justed gross estate." For the purpose of the marital deduction thus granted, the "adjusted gross estate" is computed by subtracting from the entire value of the decedent's gross estate certain expenses, indebtedness, taxes, losses, and the decedent's interest in any community property.

The estate tax return filed by the decedent's executors was examined by the Internal Revenue Service, and as a result of that examination, the marital deduction claimed by the executors thereon was adjusted to $917,639.38. The decedent's executors, however, claim that the marital deduction to which the estate is entitled should be $1,088,990.32, or one-half of the decedent's adjusted gross estate. No issue is raised as to the accuracy of the computation of the marital deduction under defendant's theory of the case, and the record contains no evidence that would dispute the presumptive validity which, under law, attached to the defendant's determination in this regard.

Prior to the Revenue Act of 1948 there was no provision permitting the deduction from the gross estate of property passing to the surviving spouse. The primary purpose for adopting the provisions now contained in Section 2056 of the Code was to equalize the situation that existed between community and noncommunity states with respect to federal estate taxes. To accomplish this purpose, the marital deduction provisions of the Code allowed a deduction equal to the value of any interest in property which passes or has passed, as of the date of death, from the decedent to his surviv-

ing spouse, but not to exceed 50 percent of the adjusted gross estate.

A reading of the statute reveals the Congressional intent regarding the marital deduction. The estate may avail itself of a deduction for property going to the surviving spouse, if the following requirements are satisfied:

(1) The property must pass *from* the decedent *to* the surviving spouse.

(2) The property must pass to the surviving spouse *in all events* and such passage must not be subject to failure or termination by reason of lapse of time, the occurrence of an event or contingency, or the failure of an event or contingency to occur.

(3) All property in which any person other than the surviving spouse inherits an interest is considered, for purposes of the marital deduction, as passing from the *decedent* to the *person* or *persons* inheriting said interest.

(4) If the person or persons inheriting an interest from the decedent disclaims part or all of their interest in the property which would otherwise inure to their benefit as a result of their heirship, and, as a result of such disclaimer, the property passes to the surviving spouse, for purposes of the marital deduction, the property is considered as having passed

from the decedent to said heir or heirs and then to the surviving spouse, and not directly from the decedent to the surviving spouse as required by Section 2056(a).

(5) Any interest in property which devolves to the surviving spouse as a result of the disclaimer by an heir of the decedent cannot qualify as property which passes or has passed from the decedent to the surviving spouse for the purposes of determining the amount of the allowable marital deduction.

Under Louisiana law, the forced heirs of a decedent are seized of right, by his death, of the property reserved to them by law. Louisiana Civil Code Article 1607. Although a forced heir in Louisiana is not required to claim his legitime, and may waive his rights to do so, the right needs only to be asserted to be allowed. *Succession of Fertel*, 208 La. 614, 23 So. 2d 234 (1945). Forced heirs of a decedent are, at the instant of the decedent's death, vested with the right to receive the legitime that the laws of Louisiana set aside to them, and this interest is inherited by the heirs from their decedent within the meaning of Section 2056(e)(2) of the Internal Revenue Code of 1954.

We agree with the Government on this issue in the instant case. The provisions of Section 2056(d)(2) of the Internal Revenue Code. Section 2056(d)(2) of the Code was amended by Section 1(a) of the Act of October 4, 1966 (P.L. 89-621, 80 Stat. 872) to provide that if an interest passes to the surviving spouse as the

result of a disclaimer, and if such disclaimer is made before the date prescribed for filing the estate tax return and the person making the disclaimer does not accept the interest before making the disclaimer, the interest shall be considered as passing from the decedent to the surviving spouse for purposes of the marital deduction. Section 1(b) of the Act of October 4, 1966, states that the amendment is applicable only with respect to estates of decedents dying on or after the date of the enactment of the Act, October 4, 1966. Thus the relief provisions of this Act are not applicable to the estate in question.

The privilege of the decedent's children to waive the rights to which they would otherwise be entitled under the laws of Louisiana, and the validity of their waiver is in no way questioned. However, the Internal Revenue Code requires that the disclaimer of the forced heirs be disregarded *only* for the purpose of computing the marital deduction allowable to the decedent's estate.

On page 21 of their original brief, the plaintiffs state:

> The three Bel children had the right to demand that the bequest made by Mr. Bel to his wife, for the purpose of taking full advantage of the provision accorded him under Section 2056 of the Revenue Code, be reduced to the disposable portion of his estate, if these heirs had desired to do so.

It was the *existence* of this right, which the plaintiffs recognized, and not the *exercise* thereof, which prohibits the decedent's estate from claiming a marital deduction greater than the disposable portion possessed by the decedent under the laws of the State of Louisiana. It is not necessary that the forced heirs exercise that right, and it certainly is not necessary that the United States be entitled to exercise that right for them, before the estate's marital deduction can be limited to the decedent's disposable portion.

Our conclusion is that the decedent's estate is not entitled to a greater marital deduction than has been previously allowed and that the plaintiffs are not entitled to recover on this issue.

Counsel will prepare and submit a judgment in accordance with the conclusions here expressed.

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana on this the 16th day of March, 1970.

/s/ EDWIN HUNTER, JR.
UNITED STATES
DISTRICT JUDGE

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-1232

MRS. DAISY MILLER BOYD BEL and RICHARD E. GERARD, Co-executors under the Last Will and Testament of John Albert Bel, deceased, ET AL,

Plaintiffs-Appellants-
Cross-Appellees,

versus

THE UNITED STATES OF AMERICA,

Defendants-Appellees-
Cross-Appellants.

Appeals from the United States District Court for the Western District of Louisiana

---

(December 9, 1971)

Before GEWIN, GOLDBERG, and DYER, Circuit Judges

GOLDBERG, Circuit Judge: In this estate tax case we are confronted with three issues, one of which con-

cerns the quantum of inclusion in the decedent's taxable estate of an accidental death policy inceptively procured within three years of the decedent's death. We deem this issue to be of transcendent importance. While the other two problems, which involve the interrelationship of the estate tax marital deduction with Louisiana's forced heirship laws and estate tax apportionment statute, do have substantial impact upon the taxpayers, they are of lesser jurisprudential significance. We first turn to the Goliath of the triad.

I. *Accidental Death Policy*

Commencing in October of 1957, the decedent, John Albert Bel, purchased annually an accidental death policy on his own life in the principal amount of $250,000. Each policy covered a term of one year, and the last such policy was acquired in October of 1960, less than one year prior to the decedent's death. While the decedent himself executed the original insurance application and paid, with community funds, all of the premiums, the policies from their inception were owned solely by the decedent's three children. The October 1960 policy matured as a result of the decedent's accidental death, and his three children, as beneficiaries under the policy, received the $250,000 proceeds. Plaintiffs Mrs. Daisy Miller Boyd Bel and Richard E. Gerard, as executors of the decedent's estate, duly filed an estate tax return, in which they omitted from the decedent's gross estate an amount equal to John Bel's community share of the policy proceeds. The Commissioner of Internal Revenue thereafter assessed a deficiency, which resulted in part from a de-

termination that the accidental death policy had been transferred by the decedent to his children in contemplation of death. The plaintiffs paid the deficiency, filed a claim for refund, and then instituted this suit.

With respect to the accidental death policy, the district court held (1) that the taxpayers failed to discharge their statutory burden of proving that the decedent's purchase of the policy was not a transfer in contemplation of death within the meaning of 26 U.S.C.A. § 2035, and (2) that the amount includable in the decedent's gross estate as a result of this transfer in contemplation of death was the purchase price of the policy (premiums paid), rather than its matured value at the time of decedent's death (insurance proceeds). On appeal, the taxpayers assert that the former holding of the district court is erroneous, while the government contends that it is the latter ruling that is incorrect as a matter of law. We affirm the district court's conclusion that the decedent's purchase of the accidental death policy was a transfer in contemplation of death, but we reverse its holding that only the policy premiums are includable in the decedent's gross estate.

Section 2035(a) of the Internal Revenue Code of 1954 requires that a decedent's gross estate shall include the value of any property which the decedent at any time transferred in contemplation of death. 26 U.S.C.A. § 2035(a). Appendant to this general principle is the statutory presumption of Section 2035(b), which provides that "[i]f he decedent within a period of 3 years ending with the date of his death ... transferred an

interest in property, ... such transfer, ... shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of his section ..." 26 U.S.C.A. § 2035(b). The underlying purpose of section 2035 is to prevent evasion of the federal estate tax by excising those transfers of a decedent which are essentially substitutes for testamentary dispositions. *United States v. Wells*, 1931, 283 U.S. 102, 116-117, 51 S.Ct. 446, 75 L.Ed. 867. Accordingly, the presumption embodied in section 2035(b) is rebuttable, for if a taxpayer can demonstrate that a donation made within the three-year period was not a substitute for a testamentary disposition, then the dominant purpose of section 2035 is not served by taxing such a transfer. Therefore, in every instance in which a transfer is effectuated within the statutory period, the crucial inquiry is whether or not the donation represents a testamentary substitute, or, in statutory terminology, whether or not the transfer was made "in contemplation of death."

The phrase "in contemplation of death" does not encompass the general expectation of death which all mortals entertain. Rather, the Supreme Court has held that a transfer is made in contemplation of death only if the thought of death is the impelling cause of the transfer. *Allen v. Trust Co. of Georgia*, 1946, 326 U.S. 630, 635, 66 S.Ct. 389, 90 L.Ed. 367. Of course, the statutory presumption casts upon the taxpayer the burden of proof as to the dominant, controlling, and impelling motive of the decedent in making a transfer. This means that the taxpayer has the task of persuading a court that in transferring property the decedent was

not motivated by purposes associated with the distribution of property in anticipation of death. *Fatter v. Usry*, E.D. La. 1967, 269 F.Supp. 582. And, of course, whether or not any particular purpose was "the dominant, controlling or impelling motive is a question of fact in each case." *Allen v. Trust Co. of Georgia, supra*, 326 U.S. at 636.

In assessing the determination of the court below, we first note that our scope of review is circumscribed by the "clearly erroneous" standard of Rule 52(a). The district court found that the taxpayers herein failed to show by a preponderance of the evidence that the decedent's dominant motive in transferring the accidental death policy was not the thought of death. The record reveals that the plaintiffs introduced evidence tending to show that the decedent had established a policy of making gifts to his children during his lifetime, and that the purchase of the accidental death policy merely represented a continuation of this appanage. It is true that a transfer will not be considered in contemplation of death if a decedent's motive for the transfer was to fulfill a plan to distribute his property during his lifetime. *United States v. Wells, supra; Landorf v. United States*, Ct. Cl. 1969, 408 F.2d 461. Plaintiffs contend that they have shown the decedent's long-established policy of providing for his progeny and that the challenged transfer was merely a continuation of that policy. Therefore, they assert that the district judge's factual determination is clearly erroneous. But in addition to showing the decedent's history of generosity, the taxpayers introduced a considerable amount of evidence tending to show that the

decedent's purpose in effectuating the challenged transfer was to avoid estate taxes. Indeed, the decedent's wife, his bookkeeper, and his secretary all testified that the decedent's reason for placing title to accidental death policy in his children was to "get the proceeds out of his estate."

A transfer is in contemplation of death when made with the dominant purpose of avoiding death taxes. *Allen v. Trust Co. of Georgia, supra,* 26 C.F.R. § 20.2035-1(c). As noted above, the district court found, in effect, that the decedent's purchase of the accidental death policy was death-motivated. When confronted with the record testimony concerning the decedent's desire to avoid estate taxes, we can only conclude that the trial judge was not clearly erroneous in his assessment of the decedent's *dominant* motive. While the only certainties in life might be death and taxes, the tax reaper cuts his swath within section 2035 when the conjunction of these certitudes has a contrived rather than an aleatory positivism. The trial court found such predesigned positivity, and we have no warrant either in fact or in law to veto this finding. The trial judge had before him the entire panoply of a life, complete with its familial ties and relationships. We agree with the taxpayers' assertion that a decedent's kindness, love, thoughtfulness, and planning are all matters to be considered in determining whether or not a gift was made in contemplation of death. But, absent an evidential vacuum or clear error, the final judgment as to motivation must come from the judicial gridiron, and not from armchair quarterbacks' reading of the game in Sunday's paper. Therefore, we affirm district

court's holding that the decedent's purchase of the accidental death policy was a transfer made in contemplation of death.

In determining *what* the decedent had transferred to his children as a result of his purchase of the accidental death policy, the district court concluded that only the dollar amount of the policy premiums was includable in the decedent's gross estate. In disposing of this issue the district court relied entirely upon the Tax Court case of *Estate of Coleman v. Commissioner* 1969, 52 T.C. 921. In *Coleman* the decedent's children purchased, more than four years prior to the decedent's death, a life insurance policy on her life. The children were the record owners and beneficiaries of the policy, but the decedent paid all of the premiums. While the taxpayers and the Commissioner agreed that approximately one-third of the policy premiums had been paid in contemplation of death, the government, on the basis of Revenue Ruling 67-463, 1967, 2 Cum.Bull. 327, contended that the amount to be included in the decedent's gross estate was a pro rata portion of the policy proceeds based on the amount of premiums that the decedent had transferred in contemplation of death.[1] The Tax Court rejected this argument. The

---

[1]Revenue Ruling 67-463, 1967, 2 Cum.Bull. 327, provides in part:

> "In view of the foregoing, it is concluded that where a decedent, within three years of the date of death and in contemplation of death, made premium payments on a policy of insurance on his life, the incidents of ownership in which were transferred more than three years prior to his death, such payment was a transfer of an interest in the policy measured by the proportion the amount of premiums so paid bears to

Court noted that prior to a 1954 amendment, the Internal Revenue Code provided that proceeds of an insurance policy on the life of a decedent which were receivable by beneficiaries other than the decedent's executor were includable in the decedent's gross estate in the proportion that the amount of premiums or other consideration paid directly or indirectly by the decedent bore to the total amount of the premiums paid for the insurance. In 1954 Congress altered the taxability of life insurance by providing in 26 U.S.C.A. § 2042 that includability of the proceeds of life insurance in a decedent's gross estate depends solely upon the decedent's retention of incidents of ownership in the policy. The congressional rejection of the premium-payment test persuaded a majority of the Tax Court in *Estate of Coleman* to conclude that a mere payment of premiums by a decedent could not operate as a transfer of an interest in the proceeds of insurance. In addition, the Tax Court stated:

> "The purpose of section 2035 is to prevent the avoidance of estate tax through the use of gifts as a substitute for testamentary disposition of what would otherwise be included in the gross estate. *Milliken v. United States*, 283 U.S. 15 (1931); see *Liebman* v. *Hassett*, 148 F.2d at 251. The focus, therefore, must be on what the decedent parted with as a result of her pay-

---

the total amount of premiums paid. Accordingly, the value of that proportion of the amount receivable as insurance that the premiums paid within three years of death bear to the total premiums paid is includible in the decedent-insured's gross estate under the provisions of section 2035 of the Code."

ment of the premiums in contemplation of death. Decedent held no interest whatsoever in the policy or its proceeds. Her children were the sole owners of the policy and only they could deal with rights and benefits flowing therefrom. To be sure, these payments kept the economic substance of that ownership alive. But the decisive point is that what these payments created or maintained was theirs and not hers. In these circumstances, we can see no basis for concluding that there was a constructive transfer of an interest in the policy. The only thing diverted from her estate was the actual money paid."

52 T.C. at 923.

In the instant case the district court concluded that the Tax Court's rejection of Revenue Ruling 67-463 in *Estate of Coleman* was controlling on the issue of whether or not any of the proceeds of the accidental death policy should be included in the decedent's gross estate. Furthermore, as an independent basis for its decision the court below quoted the above language from the *Coleman* case. On appeal the government asserts that the facts in *Coleman* are clearly distinguishable from those in the present case and that the Tax Court decision should not be considered controlling. The taxpayers, however contend that the uniform rejection of Revenue Ruling 67-463 by the judiciary dictates affirmance of the district court's holding on

this matter.[2] For a variety of reasons we are unable to agree with taxpayers' position.

In arguing that this court should affirm the lower court's ruling that no part of the insurance proceeds is includable in decedent's gross estate, the taxpayers would have us apply a section of the Code dealing with lemons (section 2042), to one pertaining to oranges (section 2035). Section 2042, which deals strictly with life insurance, provides, *inter alia*, that a decedent's gross estate shall include the value of the proceeds of life insurance policies on which the decedent possessed at his death any of the incidents of ownership. However, section 2035 provides that *all property* which is transferred in contemplation of death is includable in a decedent's gross estate. We do not think that these two code provisions were designed or conceived to be read in *para materia*. They came into being at different times, their respective targets were diverse, and we perceive no philosophic confluence to twin them. Therefore, we conclude that congressional rejection of the premium-payment test for purposes of section 2042 is foreign to the proper application of section 2035 to the instant case.

More importantly, however, we think that the district court erred in failing to recognize the fundamental factual differences between the case *sub judice* and *Estate of Coleman v. Commissioner*, *supra*. In *Cole-*

---

[2] Revenue Ruling 67-463 has also been rejected in First National Bank of Midland v. United States, 5 Cir. 1970, 423 F.2d 1286, and in Gorman v. United States, E.D. Mich. 1968, 288 F.Supp. 225. The Fifth Circuit case is distinguishable on its facts from the case under consideration. *See* note 3 *infra*.

man the premium payments were made on a policy that was brought into existence more than three years prior to the decedent's death. Thus, the original contractual rights and ownership of the policy in *Coleman* were created outside the presumptive period, and, as the Tax Court noted, those premiums paid in contemplation of death served only to keep "the economic substance of that ownership alive." In the instant case, however, the premium paid by the decedent less than one year period to his death engendered the entire right, title, and interest which the decedent's children had in the accidental death policy. Essentially, every stick in the bundle or rights constituting the policy and its proceeds had its genesis within three years of the decedent's death. Therefore, we conclude that the Tax Court's rejection of the premium-payment test as the measurement of what the decedent transferred in contemplation of death is inapplicable to the factual situation in the instant case.[3]

Finally, we, unlike the district court, are not convinced that judicial inquiry should focus on what the decedent "parted with" as a result of his purchase of the accidental death policy in contemplation of death. As noted above, the Tax Court in *Coleman* reasoned that only the value of the premiums should be included in the donor's estate because "[t]he only

---

[3] Similarly, we conclude that First National Bank of Midland v. United States, 5 Cir. 1970, 423 F.2d 1286, wherein this court rejected Revenue Ruling 67-423 in a factual context essentially identical to the situation in *Coleman*, is inapposite because of factual differences with our case. There, as in the *Coleman* case, the insurance policy had been procured more than three years prior to the decedent's death.

thing diverted from [the] estate was the actual money paid." The district court adopted this "diversion" principle, since it concluded that the decedent's estate was reduced only by the dollar amount of the policy premiums. However, we decline to follow the *Coleman* standard in this case.

In *Chase National Bank v. United States*, 1929, 278 U.S. 327, 49 S.Ct. 126, 73 L.Ed. 405, the Supreme Court upheld the constitutionality of the estate tax imposed by §§ 401 and 402(f) of the Revenue Act of 1921, ch. 136, §§ 401, 402(f), 42 Stat. 277, 278. The Court concluded that the Act imposed a tax on a decedent's privilege of transferring property at his death and thus was not invalid because not apportioned as required by art. 1, §§ 2, 9, of the United States Constitution. The plaintiffs in *Chase*, however, asserted that the tax imposed on life insurance proceeds must be deemed to be a direct tax on property because there was nothing to which a transfer or privilege tax could apply, since the beneficiaries' interests in the policies were not transferred to them from the decedent, but rather from the insurer. In answering this contention, the Supreme Court stated:

> "Obviously, the word "transfer" in the statute, or the privilege which may constitutionally be taxed, cannot be taken in such a restricted sense as to refer only to the passing of particular items of property directly from the decedent to the transferee. It must, we think, at least, include the transfer of property procurred through expenditures by the decedent

> with the purpose, effected at his death, of having it pass to another. Sec 402 (c) taxes transfers made in contemplation of death. It would not, we assume, be seriously argued that its provisions could be evaded by the purchase by a decedent from a third person of property, a savings bank book for example, and its delivery by the seller directly to the intended beneficiary on the purchasers' death, or that the measure of the tax would be the cost and not the value or proceeds at the time of death."

278 U.S. at 337.

We are cognizant of the decision in *Gorman v. United States*, E.D. Mich. 1968, 288 F.Supp. 225, wherein a federal district court, in a factual setting indistinguishable from the case before this court, gave the Supreme Court's dictum short shrift in concluding that only the value of the premiums paid by the decedent are includable in his gross estate. The court in *Gorman* viewed the problem primarily as one of applicability of the premium-payment test in valuating the property transferred. Within this limited context the *Gorman* court concluded that the Supreme Court in *Chase* had never considered the relationship between premiums and proceeds, and therefore held the *Chase* language inapposite. Accordingly, the district court in *Gorman* held that, for purposes of section 2035, the only asset transferred by the decedent in contemplation of death was the policy premium. We think that this result is an impermissibly restrictive interpretation of the term "transfer," for it essentially subverts the underlying purpose of section 2035.

In our opinion the broad legal principle enunciated by the Supreme Court in *Chase* is that the word "transfer" is not limited to the passing of property directly from the donor to the transferee, but encompasses donations "procured through expenditures by the decedent with the purpose, effected at his death, of having it pass to another." Like the Supreme Court, we perceive little seriousness in the argument that a decedent should be permitted to evade the provisions of section 2035 by funneling property to various beneficiaries through a third-party conduit. Judicial sanctioning of such evasion, we think, would so frustrate the attempted taxation of testamentary substitutes that section 2035 would stand emaciated and skeletonized beyond congressional recognition. We recognize, of course, that John Bel never formally possessed any of the incidents of ownership in the accidental death policy. As noted above, however, we conclude that section 2042 and the incidents-of-ownership test are totally irrelevant to a proper application of section 2035. We think our focus should be on the control beam of the word "transfer." The decedent, and the decedent alone, beamed the accidental death policy at his children, for by paying the premium he designated ownership of the policy and created in his children all of the contractual rights to the insurance benefits. These were acts of transfer. The policy was not procured and ownership designated and designed by some goblin or hovering spirit. Without John Bel's conception, guidance, and payment, the proceeds of the policy in the context of this case would not have been the children's. His actions were not ethereally, spiritually, or occultly actuated. Rather, they constituted worldly acts which

by any other name come out as a "transfer." Had the decedent, within three years of his death, procured the policy in his own name and immediately thereafter assigned all ownership rights to his children, there is no question but that the policy proceeds would have been included in his estate. In our opinion the decedent's mode of execution is functionally indistinguishable. Therefore, we hold that the action of the decedent constituted a "transfer" of the accidental death policy within the meaning of section 2035, and that the district court erred in failing to include John Bel's community share of the proceed value of the policy in his gross estate.

II. *The Compromise Agreement*

Having disposed of the controversy concerning the decedent's non-testamentary donation, we now direct our attention to one of the parties' disputes involving his testamentary dispositions. In his last will and testament the decedent bequeathed to his widow one-half of his separate property and the usufruct of his share of the community property. The remainder of his estate was left in trust for the benefit of his three children. Under Louisiana's forced heirship laws the decedent's disposable estate was limited to one-third of his property.[4] Since the decedent attempted to dispose of

---

[4] La. Civ. Code Ann. art. 1493 (1952) provides in part:

> "Donations *inter vivos or mortis causa* can not exceed two-thirds of the property of the disposer, if he leaves, at his decease, a legitimate child; one-half if he leaves two children; and one-third, if he leaves three or a greater number."

more than one-third of his total estate, his three children, with forced heirship rights to two-thirds of his estate, possessed the indefeasible right to reduce the decedent's bequest to his widow. In lieu of exercising their legitime, however, the children entered into a Notarial Act of Compromise in which they agreed to "waive and renounce any right which they have or may appear to have to contest or oppose the bequest made by John Albert Bel to Daisy B. Bel..." In the estate tax return the plaintiffs claimed a marital deduction equal to one-half the value of decedent's adjusted gross estate. In his deficiency notice the Commissioner reduced the marital deduction to the net disposable portion of the estate available to the decedent under the laws of Louisiana. The district court agreed with the government and held that only the value of the property which the decedent was permitted by Louisiana law to leave to his widow qualified for the marital deduction under section 2056. The district court noted that the taxpayers were entitled to a marital deduction in an amount equal to the value of property "which passes or has passed from the decedent to his surviving spouse." 26 U.S.C.A. § 2056(a). In determining that only one-third of the decedent's estate had "passed" to the surviving spouse, the district court relied upon the disclaimer provision in effect at the time of the decedent's death. That provision provided:

> "If under this subsection an interest would, in the absence of a disclaimer by any person other than the surviving spouse be considered as passing from the decedent to such person, and if a disclaimer of such interest is made by

such person and as a result of such disclaimer the surviving spouse is entitled to receive such interest, then such interest shall, for the purposes of this subsection, be considered as passing, not to the surviving spouse, but to the person who made the disclaimer, in the same manner as if the disclaimer had not been made."

Revenue Act of 1948, c. 168, Title III, § 361(a), 62 Stat. 117.[5] Essentially, the district court reasoned that the decedent's three children, as forced heirs, were vested at the instant of the decedent's death with the right to receive their legitime, and that this legitime was inherited from the decedent within the meaning of section 2056(e)(2). Furthermore, the district court concluded that since the children, by means of the Notarial Act of Compromise, disclaimed their legitime in favor of their mother, the above disclaimer provision limited the estate to a marital deduction in an amount equal to that portion of the decedent's property which was immune from the children's claim as forced heirs. While we are in complete agreement with the district court's holding that the forced heirs' legitime was an interest inherited by the children from the decedent

---

[5]In 1966 the provisions of section 2056(d) (2) of the Internal Revenue Code of 1954 were amended to provide that if an interest passes to a surviving spouse as a result of a disclaimer, then, for purposes of the marital deduction, the interest shall be considered as passing from the decedent to the surviving spouse if the disclaimer is made before the date described for filing the estate tax return and if the person making the disclaimer does not accept any interest in the property before disclaiming. Act of October 4, 1966, Pub. L. No. 89-621, § 1(a), 80 Stat. 872.

within the purview of section 2056(e)(2), we cannot accede to the application of the disclaimer provision in this case.

In our opinion the decedent's children did not "disclaim" any interest in their father's estate by virtue of the Notarial Act of Compromise. Given its ordinary and commonly understood meaning, the word "disclaimer" has been defined as:

> "* * * the repudiation or renunciation of a claim or power invested in a person for which he formally alleged to be his. The refusal, or rejection of an estate or right offered to a person. The disavowal, denial, or renunciation of an interest, right, or property imputed to a person or alleged to be his."

City Nat'l Bank & Trust Co v. United States, S.D. Ohio 1962, 203 F. Supp. 398, 402, *aff'd*, 6 Cir. 312 F.2d 118, *cert. denied*, 1963, 373 U.S. 949. In our opinion a disclaimer, which contemplates a unilateral act, is the antonym of a *quid pro quo*. In a supplementary Senate Report on the Revenue Act of 1948 the Senate Committee on Finance defined disclaimer as an unqualified refusal to accept the rights to which one is entitled and noted that "[i]f a person uses these rights for his own purposes as by receiving a consideration for his formal disclaimer he has not refused the right to which he was entitled." 2 U.S. Code Cong. & Ad. News 1226 (1948). Accordingly, a person does not disclaim his rights when he refuses to exercise them for the purpose of serving his own interests.

In the instant case the decedent's children in the Notarial Act of Compromise were not engaged in the solo performance characteristic of a disclaimer, but rather in a play in which their mother was assigned a leading role. By the express terms of the agreement, the children agreed to renounce their forced heirship rights in exchange for the widow's surrendering her cash usufruct and the proceeds on production accruing to the decedent's one-half community share of mineral royalty interests. We believe that this bilaterialism between the widow and her children negates the existence of a disclaimer of the children's forced heirship rights. Since the decedent's children received a consideration for their refusal to exercise their rights, we conclude that the disclaimer provision applied by the court below is inapplicable to the Notarial Act of Compromise.

Our conclusion that the disclaimer provision is irrelevant does not necessarily mean that the taxpayers merit a marital deduction in the claimed amount. In fact, on the basis of the record before us we are unable to determine the precise amount to which the plaintiffs are entitled. Our inability stems not from any uncertainty as to the legal principles that should be applied, but rather from an absence of relevant factual determinations by the district court.

As previously noted, we agree with the district court's holding that the children's forced heirship rights constituted an interest inherited by them from the decedent under the provisions of section 2056(e)(2) of the Code. Without more the very existence of

the children's forced heirship rights would prohibit the taxpayers from claiming a marital deduction in an amount greater than the value of the decedent's net disposable estate. *See* 26 U.S.C.A. § 2056(b) (1) (A). However, under section 2056(e) property interests can be considered as passing or having passed to a decedent's surviving spouse, under the terms of the following regulation:

> "If as a result of the controversy involving the decedent's will, or involving any bequest or devise thereunder, a property interest is assigned or surrendered to the surviving spouse, the interest so acquired will be regarded as having "passed from the decedent to his surviving spouse" only if the assignment or surrender was a bona fide recognition of enforceable rights of the surviving spouse in the decedent's estate. Such a bona fide recognition will be presumed where the assignment or surrender was pursuant to a decision of a local court upon the merits in an adversary proceeding following a genuine and active contest. However, such a decree will be accepted only to the extent that the court passed upon the facts upon which deductibility of the property interests depends. If the assignment or surrender was pursuant to a decree rendered by consent, or pursuant to an agreement not to contest the will or not to probate the will, it will not necessarily be accepted as a bona fide evaluation of the rights of the spouse."

26 C.F.R. § 2056(e) -2(d) (2). In this case we are unable to conclude as a matter of law that the Notarial Act of Compromise, which is essentially a settlement agreement, was consummated as a result of a "controversy" between the widow and her children. We have held that parties' adverse interests in a decedent's estate and a resulting settlement achieved at the conclusion of arm's length negotiations are sufficient to evidence the existence of a "controversy" within the meaning of the above regulation. *Citizens & Southern National Bank v. United States*, 5 Cir. [No. 31121, November 10, 1971]. In *Citizens & Southern* we stated that the "will controversy" regulation does not "encompass only those settlements achieved at the end of an armageddon." *Id.* at 9. But by the same token we think that, for purposes of the regulation, there must be at least a skirmish between the settling parties. The record in this case contains some evidence tending to show that the respective parties to the settlement agreement were not playing adversary roles and that the compromise was not achieved as a result of arm's length negotiations. Since we cannot determine whether true adversary positions were taken by the parties or whether the settlement was nothing more than a "sweetheart" contract, we must remand this issue to the district court for a finding on whether or not a genuine "controversy" existed between the parties. If, upon remand, the district judge finds that the settlement agreement was generated by a bona fide controversy, then he must also determine as a factual matter whether or not the children's surrender of their forced heirship rights "was a bona fide recognition of enforceable rights of the surviving

spouse in the decedents' estate" in terms of the regulation. *See Estate of Barrett v. Commissioner*, 1954, 22 T. Ct. 606. Of course, we leave to the sole discretion of the district judge whether or not to confine his inquiry to the existing record.

III. *The Louisiana Estate Tax Apportionment Statute*

The third and final issue in this tax appeal involves the interrelationship amount the estate tax marital deduction, the Louisiana Estate Tax Apportionment statute, 3A La. Rev. Stat. Ann § 2432B (1965), and Louisiana's forced heirship laws. The decedent provided in his will that the residue of his estate, which was left in trust to his three children, should bear the total federal estate tax due on his estate. In his deficiency notice to the taxpayers, the Commissioner allocated a portion of the estate tax against both the children's inheritance and the amount which the Commissioner determined qualified for a marital deduction. The taxpayers raised the issue concerning the application of the estate tax apportionment statute for the first time in their motion for entry of judgment filed subsequent to the district court's rendering a decision on the other issues and after the taxpayers and the government were unable to agree upon a computation for judgment. Essentially, the taxpayers argued that the Commissioner's allocation of the federal estate tax was in violation of the Louisiana Estate Tax Apportionment statute, which states in part that if a deceased provides in his will "for the apportionment of the tax among all the persons interested in the estate, the court shall apportion the tax as directed by the deceased." 3A

La. Rev. Stat. Ann. § 2432B (1965). After the taxpayers' motion for judgment was filed the government objected to the trial court's consideration of the Commissioner's allocation of the federal estate tax, asserting that the taxpayers' failure to raise that issue in their original claim for refund foreclosed judicial determination of the matter in a later refund suit. In the alternative, the government argued that application of the estate tax apportionment statute in the instant case would operate to defeat the legitimate rights of the decedent's children in violation of Louisiana's forced heirship laws. The district court held that the plaintiffs were precluded from raising the issue concerning the Commissioner's allocation of the federal estate tax, and that even if they were not so precluded, the estate tax apportionment statute could not be applied in the instant case in violation of Louisiana's forced heirship provisions. We agree with the court below that plaintiffs are precluded by statute from raising this issue in their suit for refund without first presenting it to the Commissioner in their claim for refund. Accordingly, we express no opinion on the merits of taxpayers' claim.

Section 7422(a) of the Internal Revenue Code of 1954 provides:

> "No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been

> excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof."

26 U.S.C.A. § 7422(a). The regulations enacted pursuant to this statutory provision state that no refund will be allowed except upon one or more of the grounds set forth in a timely filed claim, and that any such claim "must set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof." 26 C.F.R. § 301.6402-2 (b) (1). In *Tucker v. Alexander*, 1927, 275 U.S. 228, 48 S.Ct. 45, 72 L.Ed. 253, the Supreme Court stated that the government may insist upon literal compliance with the statute and the regulations. In this case we do not think that the taxpayers in their claim for refund properly raised the issue concerning the commissioner's apportionment of the federal estate tax.

With respect to the Commissioner's computation of the marital deduction, the taxpayers in their claim for refund stated:

> "Claimants contend that the adjustment made by the examiner is erroneous in that the full marital deduction of $1,088,990.32 (being one-half of the decedent's adjusted gross estate) should be allowed under the last will and testament of the decedent, which bequeathed to his

surviving spouse 1/2 of decedent's separate property, instead of $917,639.38 (being the net disposable portion as calculated by the examiner plus insurance of $284,636.16 to surviving wife). The fact that decedent's children had the right to reduce this bequest to the net disposable portion is of no consequence because the children did not in fact assert their legitime. A bequest in excess of the legitime is not null, but only reducible by the forced heirs of their option (Louisiana Civil Code Articles 1502 et seq.), and the right to assert the legitime is personal to the forced heir. Alternatively, claimants contend that the interests received by the surviving spouse should be reduced only by ($8,510.43) the value of the property interest surrendered by her in settlement of the respective rights of the legatee and the forced heirs. Regulation Section 20.2056(e)-2(d)(1)."

In our opinion this portion of the claim, fairly read, does not raise the issue concerning apportionment of the federal estate tax. Essentially, the Commissioner's apportionment of the estate tax operated to reduce the decedent's net disposable estate. In their claim for refund we do not understand the taxpayers to be contending that the Commissioner incorrectly determined the decedent's net disposable estate, but only that the marital deduction should not be limited to the decedent's disposable portion. We think that raising the issue as to whether or not the marital deduction should be limited to the decedent's disposable estate does not con-

stitute a challenge to the correctness of the Commissioner's computation of the amount of that estate. *Cf. Alabama By-Products Corp. v. Patterson*, 5 Cir. 1958, 258 F.2d 892, *cert. denied*, 1959, 358 U.S. 930. Moreover, if plaintiffs, by virtue of the above claim, intended to challenge the Commissioner's allocation of the estate tax, then we think that they failed to state facts sufficient to apprise the Commissioner of the exact basis of this claim, since the quoted portion contains no mention whatsoever as to apportionment of the estate tax in general or the application of the Louisiana Estate Tax Apportionment statute in particular. Finally, we do not think that the taxpayers ever intended to raise the estate tax apportionment issue in their claim for refund, for not only did the plaintiffs fail to include such issue in their complaint, but they did not raise the issue until subsequent to the district court's determination of all other issues and only after the taxpayers and government had reached an impasse in the computation of the judgment. Under these circumstances we conclude that the district court was correct in dismissing the taxpayers' claim concerning the Commissioner's apportionment of the federal estate tax, and that that portion of its judgment is accordingly affirmed.

For the foregoing reasons, the case is remanded to the district court for further proceedings not inconsistent with this opinion.

AFFIRMED in part and REMANDED in part.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1971

No. 71-1232

D. C. Docket No. CA 13,474

MRS. DAISY MILLER BOYD BEL and RICHARD E. GERARD, Co-executors under the Last Will and Testament of John Albert Bel, deceased, ET AL,

Plaintiffs-Appellants-
Cross-Appellees,

versus

THE UNITED STATES OF AMERICA,

Defendants-Appellees-
Cross-Appellants.

Appeal from the United States District Court for the Western District of Louisiana

---

Before GEWIN, GOLDBERG and DYER,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part; and that this cause be, and the same is hereby remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court;

It is further ordered that plaintiffs-appellants-cross-appellees, pay to defendants-appellees-cross-appellants, the costs on appeal to be taxed by the Clerk of this Court.

December 9, 1971

Issued As Mandate: Jan. 3, 1971